Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–35 OF 2007(P)
ALAUDDIN PCA, JAMES FOONG AND HELILIAH FCJJ
26 APRIL 2010

Companies and Corporations — Shares — Financial assistance — Whether agreement made for bumiputera shares given to plaintiff as consideration for financial assistance — Whether contrary to public policy

Contract — Void contract — Contrary to public policy — Agreement for bumiputera shares given to plaintiff as consideration for financial assistance — Whether agreement contrary to public policy and illegal

Evidence — Fresh or further evidence — Admission of, on appeal — Discretion of appellate court to receive further evidence — Procedure to be complied with — Admission of fresh evidence through defendant's counsel — Whether a total disregard for procedure — Whether resulted in procedural unfairness to plaintiff — Rules of the Court of Appeal 1994 r 7

Evidence — Taking of evidence — Evidence withdrawn voluntarily by witness — Whether withdrawn evidence could be relied upon

Evidence — Witness — Self-incrimination — Whether trial judge acted properly in cautioning witness against self incrimination — Whether witness testimony could associate him with insider trading — Whether reasonable for trial judge to alert witness

The plaintiff was a private limited company owned by the Chan family. They held shares in a public listed company known as Palmco Holdings Bhd ('Palmco'). The first defendant, his wife and the second defendant (a private limited company controlled by the first defendant) ('the first defendant') also held shares in Palmco. One Dato Yusof Latif, his family and the company he controlled ('Latif') also owned shares in Palmco. In 1984 Palmco announced a special rights issue for bumiputeras. Eventhough these shares were meant for bumiputeras but due to the persuasions of the first defendant and Latif, the Ministry of International Trade and Industry offered them to the first

defendant and Latif but they did not have sufficient means to take up this special rights issue. To facilitate them, the plaintiff pledged 865,000 of its own fully paid up shares in Palmco to various banks for facilities extended to the first defendant and Latif. The defendants used the loan facilities to subscribe for the special rights issue allocated to them. There was no written agreement regarding the loan of these shares and neither was there any board resolution of the plaintiff approving this exercise. Upon the defendants' default in servicing the loans, the banks recalled the loans and sold the plaintiff's Palmco shares pledged to them. The plaintiff now sought the return of these shares or its value thereof. The defendants claimed that the pledge by the plaintiff was in consideration for the sale of 500,000 special rights issue (which was part of the 3,158,959) allocated to the first defendant. The defendants had referred to a 'pool account' where the plaintiff, the first defendant and Latif would deposit their shares with the plaintiff for the purpose of transacting them. As such, the defendants claimed that the pledge was contrary to public policy, illegal and void for reasons that it was done to circumvent the issuance of shares to bumiputeras. Judgment was given in favour of the plaintiff in the High Court. The High Court found that there was no oral agreement between the plaintiff and the defendants for the sale or arrangement of the 500,000 special rights issue. The Court of Appeal reversed the decision of the trial judge. The questions posed to the Federal Court for determination, inter alia, were: (a) whether the Court of Appeal was correct in holding on the issue of facts that it was improper for the trial judge to have warned a witness of the consequences of a line of evidence that he proposed to give and to afford him an opportunity to re-think whether to proceed with the line of evidence; and (b) whether a party could resile at the appellate stage from a decision taken at the trial not to proffer certain evidence and whether it was open to the appellate court to reinstate the withdrawn evidence, and thereafter rely upon the same to make certain findings of fact adverse to the opposite party; whether the course adopted by the Court or Appeal had caused procedural unfairness.

Held, dismissing the appeal with costs here and below:

(1) The trial judge had not acted improperly in cautioning the witness against self incrimination. The witness was the first defendant himself. When he was about to testify on the existence of a pool account created and subscribed to by the directors of Palmco for the purpose of trading in Palmco shares, the trial judge issued a caution. This was appropriate since the topic which this witness was about to testify could associate him with insider trading, which is a criminal offence. If this witness had elected to continue with his testimony on the insider trading, the trial judge may, as part of his duty, report the matter to the relevant authorities to investigate. Saddled with such duty it was not unfair and

unreasonable for the trial judge to alert the witness and request him to consider the matter. Thus, question (a) was answered in the negative (see paras 34–35 & 36).

(2) Question (d) related to the impugned evidence that was deleted by DW1 from his witness's statement. The impugned evidence was not withdrawn at the insistence of the trial judge. It was withdrawn voluntarily by the witness. Once this impugned evidence was absent no party could rely on it, not even the court. Such evidence did not exist for the Court of Appeal to support its decision that since there was a pool account there must be a likelihood of a sale or arrangement of the 500,000 shares (see para 38).

(3) Fresh evidence on the impugned matter can be introduced under r 7 of the Rules of the Court of Appeal 1994. But this is subject to the 'full discretionary power to receive further evidence by oral examination in court, by affidavit, or by disposition taken before an examiner or commissioner'. Without going through this process, the Court of Appeal had taken upon itself to criticise the trial judge and then admitted the impugned evidence without going through the process as described. What the Court of Appeal did was to question the counsel before them as to what took place in the High Court. The witness involved in this entire episode, DW1, was not even asked whether this was true. And neither was the view of the plaintiff sought. This, was a total disregard for procedure. This resulted in procedural unfairness to the plaintiff where the defendants were allowed to benefit from it. This must not be allowed. Therefore, question (d) was answered in the negative (see paras 39–40).

(4) The trial judge was not plainly wrong in concluding that there was no sale or arrangement of the 5000,000 special rights issue. The findings of the trial judge were supported by cogent evidence. They were not perverse or plainly wrong. There was no reason why the Court of Appeal should reverse them. In fact, some of the alternative findings by the Court of Appeal were not even sustainable (see paras 46 & 48).

[Bahasa Malaysia summary

Plaintif merupakan syarikat sendirian berhad yang dimiliki oleh keluarga Chan. Mereka memegang saham dalam syarikat senarai awam Palmco Holdings Bhd ('Palmco'). Defendan pertama, isterinya dan defendan kedua (sebuah syarikat sendirian berhad yang dikawal oleh defendan pertama) ('defendan pertama') juga memegang saham dalam Palmco. Dato Yusof Latif, keluarganya dan syarikat yang dikawalnya ('Latif') juga memiliki saham dalam Palmco. Pada 1984 Palmco mengumumkan terbitan khas hak bumiputera. Walaupun saham-saham tersebut adalah untuk bumiputera, tetapi atas pujukan defendan pertama dan Latif, Kementerian Perdagangan

Antarabangsa dan Industri menawarkan saham-saham tersebut kepada defendan pertama dan Latif tetapi mereka tidak mempunyai sumber yang mencukupi untuk membeli terbitan khas tersebut. Bagi memudahkan mereka, plaintif menjanjikan 865,000 saham berbayar penuh miliknya dalam Palmco kepada beberapa bank untuk kemudahan kewangan yang diberikan kepada defendan pertama dan Latif. Defendan-defendan menggunakan kemudahan pinjaman tersebut untuk membayar terbitan khas yang telah diperuntukkan kepada mereka. Tiada perjanjian bertulis dibuat berkaitan pinjaman bagi saham-saham tersebut dan juga tiada resolusi daripada lembaga plaintif membenarkan perkara ini. Atas kegagalan defendan membayar semula pinjaman tersebut, bank-bank membatalkan pinjaman-pinjaman tersebut dan menjual saham-saham plaintif dalam Palmco yang telah dijanjikan kepada mereka. Kini plaintif memohon untuk pulangan saham-saham tersebut ataupun nilai saham-saham itu. Defendan-defendan menyatakan bahawa janji oleh plaintif adalah untuk balasan bagi jualan 500,000 terbitan hak khas (yang merupakan sebahagian daripada 3,158,959 saham) yang telah diperuntukkan kepada defendan pertama. Defendan-defendan merujuk kepada 'pool account' di mana plaintif, defendan pertama dan Latif akan memasukkan saham-saham mereka kepada plaintif dengan tujuan meniagakannya. Oleh itu, defendan-defendan mendakwa bahawa janji itu adalah bertentangan dengan polisi awam, menyalahi undang-undang dan tak sah disebabkan janji itu dilakukan untuk memintasi terbitan saham-saham kepada bumiputera. Penghakiman diberikan memihak kepada plaintif di Mahkamah Tinggi. Mahkamah Tinggi mendapati bahawa tiada perjanjian lisan antara plaintif dan defendan-defendan bagi penjualan atau pengurusan 500,000 saham terbitan khas tersebut. Mahkamah Rayuan mengakas keputusan hakim bicara tersebut. Persoalan yang dikemukakan kepada Mahkamah Persekutuan untuk dipertimbangkan, antara lain, adalah: (a) sama ada Mahkamah Rayuan memutuskan dengan tepat atas isu fakta-fakta bahawa adalah tidak sesuai bagi hakim bicara memberi amaran kepada saksi tentang kesan-kesan corak keterangan yang ingin diberikan dan memberikannya peluang untuk memikirkan sama ada untuk meneruskan corak keterangan itu; dan (b) sama ada satu pihak boleh berbalik kepada keadaan asal pada peringkat rayuan daripada keputusan yang telah diberikan pada peringkat perbicaraan untuk tidak mengemukakan apa-apa keterangan dan sama ada terbuka bagi mahkamah rayuan untuk memasukkan keterangan yang telah ditarik balik, dan kemudiannya merujuk kepada keterangan tersebut untuk membuat beberapa penemuan fakta yang menentang pihak yang satu lagi; sama ada cara yang digunakan oleh Mahkamah Rayuan menyebabkan ketidakadilan prosedur.

Diputuskan, menolak rayuan dengan kos di mahkamah ini dan Mahkamah Rayuan:

(1) Hakim bicara tidak bertindak sewajarnya apabila memberi amaran

kepada saksi tentang perlindungan terhadap pembabitan sendiri. Saksi tersebut merupakan defendan pertama. Apabila dia ingin memberi keterangan terhadap kewujudan akaun berkumpul yang dibuka dan digunakan oleh pengarah-pengarah Palmco untuk tujuan jual beli saham Palmco, hakim bicara tersebut memberi amaran. Ini adalah bersesuaian kerana perkara yang ingin dinyatakan oleh saksi tersebut mungkin mengaitkannya dengan perdagangan orang dalam, yang mana merupakan kesalahan jenayah. Jika saksi tersebut mahu meneruskan keterangannya tentang perdagangan orang dalam, hakim bicara boleh, sebagai tanggungjawabnya, melaporkan perkara tersebut kepada pihak berkuasa untuk menyiasatnya. Memikul tanggungjawab sedemikian, adalah adil dan wajar bagi hakim bicara untuk mengingatkan saksi tersebut dan memintanya mempertimbangkan perkara tersebut. Oleh itu, soalan (a) dijawab secara negatif (lihat perenggan 34–35 & 36).

(2) Soalan (b) berkaitan keterangan yang dipersoalkan yang mana telah dipadam oleh DW1 daripada kenyataan saksi. Keterangan yang dipersoalkan itu tidak ditarik balik atas desakan hakim bicara. Keterangan tersebut ditarik balik secara sukarela oleh saksi itu. Apabila keterangan yang dipersoalkan itu telah tiada, pihak-pihak tidak boleh merujuk kepadanya, mahkamah juga begitu. Keterangan tersebut tidak wujud untuk Mahkamah Rayuan menyokong keputusannya bahawa disebabkan wujudnya akaun berkumpul maka tentulah berkemungkinan adanya penjualan atau pengurusan 500,000 saham tersebut (lihat perenggan 38).

(3) Keterangan baru berkenaan perkara yang dipersoalkan itu boleh dikemukakan di bawah k 7 Kaedah-Kaedah Mahkamah Rayuan 1994. Tetapi ini tertakluk kepada 'full discretionary power to receive further evidence by oral examination in court, by affidavit, or by disposition taken before an examiner or commissioner'. Tanpa melalui proses ini, Mahkamah Rayuan telah mengkritik hakim bicara dan kemudiannya memasukkan keterangan yang dipersoalkan tanpa melalui proses tersebut seperti yang telah diterangkan. Apa yang dilakukan oleh Mahkamah Rayuan ialah menyoal peguam tentang apa yang berlaku di Mahkamah Tinggi. Saksi yang terlibat, iaitu DW1, tidak pun ditanya sama ada perkara ini benar. Ini mengakibatkan ketidakadilan prosedur kepada plaintif yang mana defendan-defendan mendapat faedah daripadanya. Ini tidak harus dibiarkan. Oleh itu, soalan (b) dijawab negatif (lihat perenggan 39–40).

(4) Hakim bicara jelas telah silap apabila memutuskan bahawa tiada penjualan atau pengurusan terhadap 500,000 terbitan khas tersebut. Keputusan-keputusan hakim bicara disokong oleh keterangan yang kukuh. Keputusan-keputusannya tidaklah berlawanan atau jelas silap.

Tiada sebab bagi Mahkamah Rayuan mengakasnya. Malah, beberapa keputusan alternatif Mahkamah Rayuan tidak boleh diterima (lihat perenggan 46 & 48).]

Notes

For cases on admission of, on appeal, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1665–1681.

For cases on contract contrary to public policy, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5593–5595.

For cases on financial assistance, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 827–833.

For cases on taking of evidence generally, see 7*Mallal's Digest* (4th Ed, 2010 Reissue) paras 2625–2630.

For cases on witness generally, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2687–2913.

Cases referred to

Amanullah bin Haji Ali Hasan v Hajjah Jamilah binti Sheikh Madar [1975] 1 MLJ 30, HC (refd)

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41, PC (refd)

Civil Service Co-operative Society Ltd, The v The General Steam Navigation Co [1903] 2 KB 756, CA (refd)

Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (folld)

Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors [1979] 2 MLJ 224, FC (refd)

Izod, In re [1898] 1 QB 241, CA (refd)

Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25, SC (refd)

Watt or Thomas v Thomas [1947] AC 484, HL

Legislation referred to

Companies Act 1965 s 133A(1)(b)
Rules of the Court of Appeal 1994 r 7, 7(i)

Appeal from: Civil Appeal No P-02–962 of 2002 (Court of Appeal, Putrajaya)

Cyrus Das (Tan Swee Cheng with him) (Cheong Wai Meng & Van Buerle) for the appellant.
Surinder Singh (Ong & Manecksha) for the respondents.

James Foong FCJ:

INTRODUCTION

[1] The background facts of this case are not disputed. They are as follows. The plaintiff is a private limited company owned by the Chan family. They held shares in a public listed company known as Palmco Holdings Bhd ('Palmco') which is listed in the Kuala Lumpur stock exchange. The first defendant, his wife and the second defendant (which is a private limited company controlled by the first defendant) whom we shall collectively refer to as the first defendant and his group, also held shares in Palmco. There is another Malay gentleman by the name of Dato Yusof Latif ('Latif'). Like the first defendant, Latif, his family and the company he controlled (collectively refer to as Latif and his group) also owned shares in Palmco. Together, these three groups were the majority shareholders of Palmco and by virtue of Datuk Chan Woot Khoon, Chan Koi Koon and Chan Fook Khoon, nominees of the plaintiff, the first defendant and Latif, as elected directors of Palmco effectively controlled the operation of Palmco.

[2] The relationship between the Chan family, the first defendant and Latif was good until a dispute erupted. It all began when Palmco announced a special rights issue for bumiputeras in 1984 at RM1 per share. The total special rights issue amounted to 9,640,000 shares. These shares were originally offered to bumiputera institutions but due to the persuasive powers of the first defendant and Latif, the Ministry of International Trade and Industries (MITI) reversed its decision and offered them to the defendant and his group and Latif and his group instead. But the first defendant and his group and Latif and his group did not have sufficient means to take up this special rights issue. To facilitate them, the plaintiff in this instant case pledged its own fully paid up shares in Palmco to various banks for facilities extended to the first and his group and Latif and his group. In this instant case, the plaintiff pledged a total of 865,000 of its Palmco shares to several banks for facilities to the defendants.

[3] The defendants had used the loan facilities granted to them by the various banks to subscribe for the special rights issue allocated to them.

[4] There was no written agreement regarding the loan of these shares and neither was there any board resolution of the plaintiff approving this exercise. The only documentary evidence for this transaction were the memorandums of deposit executed by the plaintiff in favour of the banks granting the loans.

[5] The defendants serviced the loan from 1984 (the date of draw down) till 1989 when they stopped due to the economic downturn. As a result of this, the banks recalled the loans and upon default sold the plaintiff's Palmco shares pledged to them. The plaintiff is now seek the return of these shares or its value thereof.

[6] According to the plaintiff, their Palmco shares were pledged 'on the express and/or implied understanding that the said shares are to be returned to the plaintiff by the defendants on demand'. In addition, the plaintiff asserts that 'It is also an express and/or implied condition that the defendants will not breach the terms and conditions of their loan agreements with their respective bankers so as not to jeopardise the plaintiff's shares deposited with the banks'. Since the defendants failed and/or neglected to return the said shares after due notice and having breached the terms and conditions of the loan agreements with the banks thereby jeopardising the said shares, the plaintiff sought:

(a) an order that the first and second defendants return a total of 2,195,000 Palmco shares;

(b) alternatively to pay for the value of these shares to be valued as at date of judgment;

(c) interest and costs.

[7] The defendants denied the plaintiff's claim and put forth the following defences.

[8] First, the pledge by the plaintiff was in consideration for the sale of 500,000 special rights issue (which was part of the 3,158,959) allocated to the first defendant and his group. Since these shares were allotted to bumiputeras and the plaintiff not being one, the first defendant and his group held them on trust for the plaintiff. This contravenes public policy rendering the entire transaction null and void. When the transaction is null and void, there is no necessity for the defendants to replace the shares or its value thereof.

[9] In the alternative, the defendants claim that the 500,000 special rights issue 'was for the joint benefit of the plaintiff and defendants and the defendants held 500,000 shares on behalf of the plaintiff who deposited their Palmco shares, together with the special issues shares taken by the defendants, as security for credit facilities advanced for purchase of the special issue shares'.

[10] In the further alternative, the defendants assert that since the first defendant and the plaintiff's directors were directors of Palmco, the pledge contravenes s 133A(1)(b) of the Companies Act 1965.

[11] Aside from the defence, the defendants made a counterclaim against the plaintiff for a declaration that the pledge 'is contrary to public policy, illegal and void for reasons that it was done to circumvent the issuance of shares to Bumiputra and Bumiputra controlled companies'.

[12] For this counterclaim, the plaintiff did not file a reply and defence to counterclaim.

HIGH COURT

[13] Judgment was given in favour of the plaintiff in the High Court on the following grounds.

[14] There was no agreement between the plaintiff and the defendants regarding the sale or arrangement for the 500,000 special rights issue.

[15] The defendants failed to call Hooi Kee Sum (Hooi), the financial controller of Palmco who had knowledge of the transaction regarding the pledge to testify on their behalf.

[16] Though the defendants had referred to a 'pool account' where the plaintiff, the first defendant and his group together with Latif and his group would deposit their shares with the plaintiff for the purpose of transacting them, there is no documentary evidence to substantiate this.

[17] It is a fact that the defendants required the assistance of the plaintiff to pledge their shares in order for the defendants to take up the special rights issue.

[18] It is untrue that the 500,000 special rights issue was sold to or arranged with the plaintiff so that the plaintiff can control Palmco. The plaintiff, on their own, has sufficient shares to do this.

[19] The defendants were unable to identify the exact amount of their shares sold or arranged with the plaintiff and this 'further adds to the disbelief of the defence story'.

[20] Section 133A(1)(b) of the Companies Act is not applicable in this case as the alleged sale or arrangement took place in 1984. This provision only came into force on 1 February 1987.

[21] On the failure of the plaintiff to file a defence to the counterclaim, the declaration sought in the counterclaim is no more than a repeat of the defence. Since it is not independent of the defence, the plaintiff is excused from filing further pleadings.

[22] Having arrived at a finding that there was no oral agreement between the plaintiff and the defendants for the sale or arrangement of the 500,000 special rights issue, the High Court decided that it is unnecessary to deal with the issue of the validity of such a sale or arrangement.

COURT OF APPEAL

[23] The Court of Appeal reversed the decision of the trial judge and advanced the following grounds after observing 'that this appeal is based purely on facts' and the 'only issue is whether there was in fact an agreement made between the plaintiff and the defendant that 500,000 of the 3,158,959 Bumiputra special rights issue shares allotted to the defendant were to be given to the plaintiff as the consideration for the Plaintiff's assistance in pledging its Palmco shares in favour of the banks in order to enable the defendants to obtain the bank loans to purchase the said Bumiputra rights issue shares'.

[24] Regarding the lack of documentary evidence to support the defendants' claim of that an oral agreement for the sale or arrangement of the 500,000 special rights issue exist, the Court of Appeal said 'no sensible person would want to commit to writing a transaction which is illegal and unlawful unless the parties are completely ignorant of the law'.

[25] On the adverse influence that the defendants were unable to produce documentary evidence to support the existence of a 'pool account', the Court of Appeal found the trial judge had intimidated the defendants' witness (DW1) into withdrawing such claim from his testimony. As this is a principal ground for reversing the trial judge's finding, we reproduce *in extensio* what the Court of Appeal ruled.

> On our query as to why they were deleted at the court below, the counsel for defendants (appellants in this appeal) said they were deleted at the insistence of the learned judge who threatened that if that part of the statement was not withdrawn he would lodge a report to the relevant authorities. Because of such insistence by the learned judge that portion of DW1's statement was eventually deleted. Such being the scenario how then could DW1 bring evidence of the pool account when the learned judge himself insisted on the deletion of the evidence pertaining to the pool agreement.

A As recorded in the notes of evidence it would appear that DW1 was initially very reluctant to delete those part of his evidence, based on the followings:

Q: See Q/A 23, 24, 25 and 26. You are aware you are making defamatory statements against my client and his brother, Dato' Robert Chan.

B A: I'm stating a fact.

Q: I put it to you that there is no pool account or football pool account as alleged by you?

A: I don't agree. I can produce some accounts that will show the existence of those accounts.

C Q: But, it is not before this Court?

A: Not at the moment.

Q: Are you confessing to this Court that you and Datuk Latif participated insider trading in Palmco shares and hereby committed a criminal offence?

D Before DW1 could give his answer to that question the court made the insistence to delete that part of DW1's statement. Hence the hearing was adjourned to another day (8 February 2002). And at the continued hearing on 8 February 2002 it was recorded '*By consent, counsel for the defendants wishes to delete Q/A 23, 24, 25, 26, 27(1) and (iv) and (v), 28, 29 and 30*'. Before us the E counsel for the appellants/defendants informed us that he was forced by the learned judge to delete those parts of DW1's statement. Such information by the appellant's counsel was not denied by the respondent's counsel. We took it that it must be true.

Two things can be inferred from this episode. Firstly, the existence of such 'pool F agreement' could be true having regard to the fact that DW1 was ever willing to expose himself to a criminal action. In answer to a question by the plaintiff's counsel, DW1 said 'I am stating a fact' and 'I can produce some accounts that will show the existence of those accounts'. Secondly, in the light or the court ruling that the evidence on the 'pool account' be deleted it would be quite obvious to us that the opportunity for DW1 to produce those accounts had G been directly deprived by the order of the learned judge. Based on DW1's answers under cross-examination and the subsequent ruling by the learned judge it is highly improper for the learned judge to conclude that DW1 could not produce that piece of documentary proof. The learned judge had also seriously misdirected himself when he asked that part of DW1's statement to be H deleted as that would form a relevant fact to the issue in hand. He had further made a wrong conclusion when he drew an adverse inference for DW1's failure to produce documentary evidence on the existence of the pool account after insisting that such evidence be deleted.

I **[26]** On the adverse inference that the defendants did not call Hooi to testify, the Court of Appeal decided that 'it would be utterly suicidal for the defendants to call Hoe (Hooi) Kee Sim to support DW1's contention knowing fully well that Hooi worked for the plaintiff's directors and he would definitely give evidence against the defendants where the nature of his

answers would be purely oral and not documentary. We feel that this failure should not have been used by the learned judge as a valid ground to arrive at the conclusion which he did'.

[27] The Court of Appeal then elaborated that it is reasonable to believe that the defendants did not dispose of the special rights issue to a third party at a profit when they were first allotted but instead entered into sale or arrangement with the plaintiff because 'they were prepared to float and sink with the Chan family' in order 'to continuously control Palmco from 1982–1989'. Further, 'it must be stressed that on the basis of the Chan family's shares only, they would not be able to be in control of Palmco'.

[28] The Court of Appeal then proceeded to make a finding of fact that the plaintiff's delay in bringing this action until almost six years after their pledged shares were sold by the banks 'must definitely be some form of consideration given for such generous favour involving great risk' and this consideration must be for the sale or arrangement entered with the plaintiff for the 500,000 special rights issue.

[29] As to the failure of the defendants to identify their respective amount of shares sold or arranged with the plaintiff, the Court of Appeal found that this 'should not be a concern of the plaintiff so long as it (the plaintiff) receives 500,000 shares'.

[30] Finally, the Court of Appeal found that since the sale or arrangement of the 500,000 special rights issue is contrary to public policy it is void without the need for the defendants to replace the pledged shares or the value thereof.

[31] Regarding the contravention of s 133A(1)(b) of the Companies Act and the plaintiff's failure to file a reply and defence to the counterclaim, the Court of Appeal upheld the rulings of the trial judge on these issues.

QUESTIONS POSED

[32] Four questions were posed to this court for determination. They are:

(a) Whether any illegality could arise where no statutory requirement exists for the allotment of bumiputera shares in a rights issue by a public company and the allotment is undertaken as a matter of policy notwithstanding the judgment of the Federal Court in *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors* [1979] 2 MLJ 224?

(b) Whether the plaintiff could be barred from recovering its own shares or the value of them when if it did not have to found its cause of action on the so called illegality attached to the bumiputera shares?

(c) Whether the Court of Appeal was correct in holding on the issue of facts that it was improper for the trial judge to have warned a witness of the consequences of a line of evidence that he proposed to give and to afford him an opportunity to re-think whether to proceed with the line of evidence?

(d) Whether a party could resile at the appellate stage from a decision taken at the trial not to proffer certain evidence and whether it was open to the appellate court to reinstate the withdrawn evidence, and thereafter rely upon the same to make certain findings of fact adverse to the opposite party; whether the course adopted by the Court or Appeal has caused procedural unfairness?

ANALYSIS

[33] The first two questions concern the issue of the legality of the sale or arrangement for the 500,000 special rights issue while the third and fourth relate to whether there was such a transaction. In our opinion it is only logical to deal with the last two questions first before returning to the first and second if the earlier questions are answered in the positive.

Question (c): Whether the action of the trial judge was proper

[34] Having perused the facts as disclosed, we are of the opinion that the trial judge had not acted improperly in cautioning the witness against self incrimination. The witness was the first defendant himself. When he was about to testify on the existence of a pool account created and subscribed to by the directors of Palmco for the purpose of trading in Palmco shares, the trial judge issued a caution. This was appropriate since the topic which this witness was about to testify could associate him with insider trading.

This is where a director of a company, especially one which is listed in the stock exchange, in possession of confidential and privileged information, had used this to his own advantage for personal gain. This is against the law and a criminal offence. So before this witness could proceed further, the trial judge cautioned him by informing him that he may expose himself to criminal prosecution. This part of the court's proceeding which is so crucial to the accusation that the trial judge had intimidated this witness was left out by the Court of Appeal in its judgment. We now reproduce it.

Q: Are you confessing to this Court that you and Dato Latif participated insider trading in Palmco shares and thereby committed a criminal offence?

> By consent, parties asked for case to be taken off tomorrow and be continued on 8/2/02 at 2.45 p.m.

[35] If this witness had elected to continue with his testimony on the insider trading, the trial judge may, as part of his duty, report the matter to the relevant authorities to investigate. This is not without precedent. In *Amanullah bin Haji Ali Hasan v Hajjah Jamilah binti Sheikh Madar* [1975] 1 MLJ 30 at p 31 the court made the following directions:

> The evidence so far adduced in this case shows that there was a commission of an offence connected with forgery considering my finding that the '1964 will' is in effect a false document. See s 464 third explanation of the Penal Code. But as far as I can see there should be further investigation before any criminal action can be commenced. I direct the senior assistant registrar to send a copy of the proceedings in this case to the public prosecutor for his consideration and, if necessary, to direct further investigation and to issue a sanction to prosecute under s 129 of the Criminal Procedure Code.

[36] Saddled with such duty it was not unfair and unreasonable for the trial judge to alert the witness and request him to consider the matter. There is no evidence that the trial judge had intimidated this witness or forced him to withdraw any part of his testimony. In fact throughout the proceeding, DW1 was represented by counsel. He had independent advice. Further, this witness did not delete the impugn paragraphs from his witness's statement immediately after the cautioned. He took a couple of days to consider. It was only after the trial resumed on 8 February 2002 did DW1 voluntarily consented to withdraw the impugn matter. So he had not only sufficient time to consider but also made with the assistance of legal advice.

[37] For reasons aforesaid, we answer question (c) in the negative.

Question (d): Can the Court of Appeal reinstate withdrawn evidence and rely on it

[38] Question (d) relates to the impugn evidence that was deleted by DW1 from his witness's statement. The Court of Appeal ruled that the trial judge had misdirected himself when he drew adverse inference on DW1's failure to produce documentary evidence to support the existence of a pool account when in truth this witness was prevented from doing so by the trial judge. As discussed, this is incorrect. The impugn evidence was not withdrawn at the insistence or threat by the trial judge. It was withdrawn voluntarily by the witness. Once this impugn evidence is absent no party can rely on it, not even the court. Such evidence just does not exist for the Court of Appeal to support its decision that since there was a pool account there must be a likelihood of a sale or arrangement of the 500,000 special rights issue.

A **[39]** Of course, fresh evidence on the impugn matter can be introduced under r 7 of the Rules of the Court of Appeal 1994 ('CA Rules'). But this is subject to the 'full discretionary power to receive further evidence by oral examination in court, by affidavit, or by disposition taken before an examiner or commissioner' — see sub-r (1) of r 7 of the CA Rules. In this instance, B without going through this process, the Court of Appeal has taken upon itself to criticise the trial judge and then admitted this impugn evidence without going through the process as described. What the Court of Appeal did was to question the counsel before them as to what took place in the High Court. The witness involved in this entire episode, DW1, was not even asked C whether this was true. And neither was the view of the plaintiff sought. This, in our opinion is a total disregard for procedure. The Court of Appeal has fallen into the error of receiving evidence without complying with procedure designed to test the probative value of evidence adduced by a witness in court. In our considered view, this has resulted in procedural unfairness to the D plaintiff where the defendants were allowed to benefit from it. This must not be allowed.

[40] Accordingly for reasons aforesaid, we answer question (d) in the negative.

E

[41] Before we leave this subject and move on to the next two questions, we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, unless the trial judge is plainly wrong in his finding, the appellate court should not F reverse a finding of fact by the trial judge. This 'plainly wrong' test has been long established and can be observed in the judicial committee of the Privy Council pronouncement in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 where Lord Fraser said:

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> In the face of that finding by the trial judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion, as the authorities already quoted show.

H

[42] Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial judge.

I

[43] The first is Lord Tankerton in *Watt or Thomas v Thomas* [1947] AC 484:

(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself as a judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court.

[44] The second is from Viscount Sankey LC in *Streatham Manor Nursing Home* [1935] AC 36, at p 36 who said:

it is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it reseeing the court. There are different meanings to be attached to the word 'rehearing'. For example the rehearing at the Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appearing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after trial before a judge alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there have been a conflict of evidence the Court of Appeal will have special regard to the fact that the trial judge saw the witnesses: see *Clarke v Edinburgh Tramways Co* 1919 SC (HC) 35 at p 36, per Lord Shaw where he says:

When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to creditability or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice in the ordinary case things are much more evenly divided; witness without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in their nuance, of their expressions, in even the turns of the eyelid, left an impression upon the man who say and heard them

> which can never be reproduced in the printed pages. What in such circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[45] The above principle is reiterated by this court in *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 11.

[46] In relation to the instant case, based on the reasons advanced by the Court of Appeal in reversing the finding of trial judge, we are not convinced that the trial judge was plainly wrong in concluding that there was no sale or arrangement of the 5000,000 special rights issue. Even casting aside the errors committed by the Court of Appeal regarding the admission of certain evidence and focus on the other reasons advanced, we find that they are no more than just substituting one's discretion for that of another with no benefit and privilege as the trial judge had in seeing and hearing the witnesses. This should be discouraged as illustrated by Lord Halsbury in *The Civil Service Co-operative Society Ltd v The General Steam Navigation Co* [1903] 2 KB 756 at p 765 (which was adopted by our Supreme Court in *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 at p 27) who said:

> No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied.

[47] Again, the same sentiments were expressed in *In re Izod* [1898] 1 QB 241 which said:

> The registrar had exercised her discretion vested in her and a discretion which the Court of Appeal should not interfere with, except in very exceptional and strong cases.

[48] In this instant case, the findings of the trial judge are supported by cogent evidence. They are not perverse or plainly wrong. We see no reason why the Court of Appeal should reverse them. In fact, some of the alternative findings by the Court of Appeal are not even sustainable. Instances of this are as follows.

[49] On the adverse inference taken by the Court of Appeal that the appellant took almost six years to file a claim against the defendants as an indication that the sale or arrangement for the 500,000 special right exist is totally unacceptable and procedurally flawed. The plaintiff was not given a chance to explain this during the trial. No question was ever asked on this by the defendants during the trial in the High Court. In fact, this was not even an issue nor was it pleaded. The Court of Appeal just plugs this out from nowhere to support the existence of a sale or arrangement for the 500,000 special rights issue.

[50] The Court of Appeal's conclusion that it was absolutely suicidal to call Hooi to testify because Hooi works for the plaintiff and 'would definitely give evidence against the defendants' is purely speculative. There is no evidence that Hooi is of such character whose testimony cannot be believed. Hooi has not even been requested to testify by the defendant nor subpoenaed to do so. In the absence of this how could this fact be verified?

[51] When the Court of Appeal ruled that it was unnecessary for the defendants to identify their respective amount of shares sold or arranged with the plaintiff so long as the plaintiff receives them the Court of Appeal did not take into account that the defendants are separate entities. Though the first defendant was in control of the second defendant, the second defendant is a private limited company which has its own identity and accountability. If each of these defendants could not specify the amount of their respective shares sold or arranged with the plaintiff then such alleged sale or arrangement could not have been concluded due to uncertainty.

Questions (a) & (b): Whether a transaction of the special rights issue meant for bumiputera is against public policy and therefore illegal

[52] Now, we shall deal with the first and second question concerning the legality of the transaction which the defendants insist is against public policy. But in view of our opinion expressed in the earlier questions that there was no sale or arrangement of the 500,00 special rights issue between the parties, these questions are academic which do not require this court to deal with.

CONCLUSION

[53] For reasons aforesaid, we would dismiss this appeal with costs here and below with the deposit for this appeal to be returned to the plaintiff. The orders of the Court of Appeal should be set aside and the orders of the High Court affirmed.

[54] As agreed, the result of this appeal will bind Federal Court appeal No 02–34 of 2007(P). Similarly the appeal in that case is allowed with costs here and below. The orders of the Court of Appeal in that case are set aside and the orders of the High Court made there under are affirmed.

Appeal dismissed with costs here and below.

Reported by Kanesh Sundrum